United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

D.C. - WKM-EAT
5-28-69
(3)

BRIEF FOR APPELLANTS AND THEIR APPENDIX

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

546

No. 22,104

CORA VIRGINIA PEREGORY, Surviving Widow of
Walter L. Peregory, Deceased Employee,

And

MILTON LEE BUSSIUS, Her Surviving Minor Child,
By said Cora Virginia Peregory as Mother and
Next Friend,

Appellants,

v.

WILLIAM L. MASSEY, Deputy Commissioner,
District of Columbia Compensation District,
Bureau of Employees' Compensation,
United States Department of Labor,

ROBERT J. BRADY CO., INC., a corporation,
Doing Business As Lithographic Photographic
Services, Inc.,

NATIONWIDE MUTUAL INSURANCE COMPANY,
A corporation,

Appellees.

APPEAL IN FORMA PAUPERIS FROM A SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DENYING APPELLANTS' CLAIMS.

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Title 28, United States Code Annotated, Chapter 83 - Courts of Appeals, Section 1291. Final decision of district courts

The Courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . .

Title 33, United States Code Annotaged, Chapter 18. -- Longshoremen's and Harbor Workers' Compensation Act, Section 921. Review of compensation orders

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia, if the injury occurred in the District). . . .

Title 36, D. C. Code, 1967, Labor, Chapter 5.--Workmen's Compensation, Section 36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to District of Columbia. The provisions of chapter 18 of title 33, U. S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, . . .

Title 33, United States Code Annotated, Chapter 18. --Longshoremen's and Harbor Workers' Compensation Act.
Section 920. Presumptions In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary --

(a) That the claim comes within the provisions of this chapter.

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Section 1291, Title 28, U.S. C., as amended, the District Court's order dated May 9, 1968, being a final decision. (App. 16.)

The District Court had jurisdiction under and pursuant to the provisions of Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC Sec. 921, made applicable to the District of Columbia by Section 36-501, D. C. Code, 1967, as amended, to set aside an order denying compensation.

STATEMENT OF ISSUES OR QUESTIONS PRESENTED.

1. Did the District Court and Appellee Deputy Commissioner ignore the presumption in favor of compensability of appellants' claims, provided by Section 20 of the Act (33 U.S.C.A. 920) that "it shall be presumed, in the absence of substantial evidence to the contrary . . . That the claim comes within the provisions of" the Act?

2. Is the opinion testimony of Dr. Samuel Dessoff for appellees, based upon his examination of Deceased Employee Peregory more than nine months prior to the latter's death, that Mr. Peregory's work, even though he had preexisting coronary artery disease, had nothing to do with his death, on which the District Court and Appellee Deputy Commissioner rejected appellants' claims to workmen's compensation death benefits, "substantial evidence" contrary to and overcoming the Act's presumption that their claims came within the act, supported by evidence for appellants?

3. If there any evidence in the record that Deceased Employee Peregory's fatal heart attack, about 9 O'Clock, P. M., November 21, 1962, after he arrived at his home from work about 7:20 O'Clock, P. M., was caused by anything other than the great mental and physical strain of his "deadline" work?

4. Is it not factual: (a) that there is no substantial evidence in the record that the death of Deceased Employee Peregory was due to any cause other than his work,

and (b) that the testimony of appellees' Doctor Samual Dessoff (who last examined said Peregory on February 9, 1962, more than nine months prior to his death on November 21, 1962) that in said doctor's opinion the deceased employee's work had nothing to do with his death is not substantial evidence contrary to and does not overcome the statutory presumption in favor of compensability of appellants' claims?

5. Did not the District Court and the Deputy Commissioner erroneously and illegally discredit and ignore controlling testimony of appellants' witnesses showing and supporting compensability, which was not inherently incredible and which was not contradicted by any evidence in behalf of appellees?

6. Are the summary judgment of the District Court against, and the Deputy Commissioner's rejection of, appellants' claims to workmen's compensation death benefits, contrary to the law and the evidence.

Note: As required by this Court's Rule 8 (d) appellants' counsel states that this case has not previously been before this Court under the same or similar title.

STATEMENT OF THE CASE.

Appellants appeal in forma pauperis from the District Court's final decision by its summary judgment Order dated and filed May 9, 1968, granting appellee deputy commissioner's motion for summary judgment, denying appellants' cross-motion for summary judgment, and dismissing appellants' action with prejudice. (App. 16.)

Appellants' appeal without prepayment of costs was permitted by the District Court's order of June 7, 1968. Appellants attorney has been greatly handicapped by lack of funds for printing.

Appellants base their claim to workmen's compensation death benefits upon the death of Employee Walter L. Peregory, husband and foster father of appellants, upon their evidence, and especially upon the legal presumption in their favor provided by Section 20 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 920) that "it shall be presumed, in the absence of substantial evidence to the

contrary . . . That the claim comes within the provisions of" the Act. Said Act is made applicable to the District of Columbia by Section 36-501, D. C. Code, 1967, as amended.

As hereinafter shown, there is no substantial evidence in the record contrary to an award of workmen's compensation death benefits to appellant wife and foxter child.

There is no dispute that on November 21, 1962, Employee Walter L. Peregory was in the employ of Appellee Employer Robert J. Brady Company in the District of Columbia; that said employer was subject to the provisions of the Act to provide compensation for disability or death resulting from injury to its employees; and that said employer's liability for compensation was insured by Appellee Nationwide Mutual Insurance Company. See Compensation Order - Rejection of Claim for Death Benefits (App. 8).

All the evidence is in the Transcripts of Hearings before the Deputy Commissioner of Workmen's Compensation which are exhibits in the record.

The Compensation Order - Rejection of Claim For Death Benefits (App. 8) shows that the Deceased Employee was employed as an offset pressman; that his duties entailed the operation of an offset press and supervision of another pressman and a bindery worker, and that he was responsible for production in the pressroom once an assignment had been given to him. It also shows that on November 21, 1962, the employee arrived home at approximately 7:20 P. M., had his evening meal, and retired, complaining of feeling physically tired; that upon awaking shortly thereafter he proceeded to a bowling alley, having been preceded by his wife; that shortly thereafter, while sitting alone at a table he slumped to the floor and was pronounced dead on arrival at the hospital at approximately 10:00 P. M.; and that death was caused by acute coronary insufficiency due to coronary artery disease.

The Compensation Order further shows (App. 9) that the Deceased Employee had for several years prior to his death on November 21, 1962, suffered from coronary artery disease; that after November 1, 1961, he performed the usual duties of a pressman,

which included loading the presses with reams of paper, varying in weight from 5 to 50 pounds (App. 10). In short, Appellee-Employer Brady accepted with the Deceased Employee the frailties that predisposed him to bodily hurt.

The District Court and the Appellee Deputy Commissioner consistently ignored the law that the Act is to be construed liberally for the benefit of employees and their dependents, and that doubts, including the factual, are to be resolved in their favor.

The Compensation Order states, incorrectly and against the testimony of appellants' witnesses, whose testimony was not actually contradicted and was not inherently incredible, and consequently could not legally be ignored, that the deceased employee "for the 2 weeks immediately preceding his death, including the date of death, . . . did not work in excess of 8 hours per day or 5 days per week," and "that there was no credible testimony that during the said period, the employee was subject to any employment related emotional disturbances or any significant physical exertion."

The foregoing findings of Appellee Deputy Commissioner discredited and ignored the not inherently incredible and uncontradicted testimony of decedent's witnesses, and illegally resolved his doubts against appellants, contrary to the rule of law in this Court and district that "In their (employees and their dependents, such as appellants) favor doubts, including the factual, are to be resolved." Decedent's widow, Appellant Cora Peregory, testified (App. 10, 11) that decedent worked overtime; that he complained very much of being tired and fatigued and overworked; that he had chest pains during the time that he worked overtime; that he was not feeling good on Friday, a few days before his death on a Wednesday; that he came home much worse on Monday; that his breathing was not regular; that Tuesday he was sick and should have stayed home; that Wednesday (the day he died) he was late getting home; that after his dinner decedent laid down complaining he was tired; that these last three days he was under emotional stress as he had a special job to get out by a deadline he nad to meet; and that he did no work around his home.

Stanley Cheseldine, decedent's nephew and subordinate worker, testified (App. 3) that decedent lifted heavy reams of paper; that he was not feeling good and looked tired his last three days; that on Tuesday decedent was at his press gasping for breath for about a minute and a half, and clapped his right hand over his heart; that decedent on Wednesday (the day he died) worked after 5 P. M., and while walking to his car stopped, complained of pain, was breathing hard for about two minutes, and covered his left breast; that decedent took pills after he got into his car; that decedent worked overtime November 19, 20th and 21st; that decedent went up and down stairs numerous times, sometimes he walked and sometimes he "zipped up." Milton Sussius, decedent's foster son and an appellant, testified (App. 6) that decedent worked on Saturdays to keep up with the work, to keep it on schedule so it would not get behind; that decedent was worried about his work; that decedent worked the Saturday before he died and was tired. Mrs. Janoff, sister of Appellant Cora Peregory, testified (App. 6) that decedent complained of feeling tired; that his personal appearance deteriorated; that his tiredness and disarray continued up to his death; that decedent complained that his work was getting to be too much for him, and that he applied for a supervisory job in Florida. Appellant Cora Peregory testified (App. 7) that decedent came home late his last three days, corroborating Stanley Cheseldine's testimony that decedent worked overtime November 19th, 20th and 21st.

The Compensation Order erroneously and incorrectly discounts and discredits the Deceased Employee's personal physician's testimony and opinion that the employee's coronary artery disease may have been aggravated by his work (App. 11, Tr. 97, 109, 115) on the basis that "there was no credible evidence that the employee at any time 'worked extra long hours where he could not be relieved', or that he suffered from employment related 'nervous strain,' "overwork' or 'exhaustion.'" App. 11, Comp. Order 4). The testimony of decedent's widow, foster son, sister in law and nephew showed that decedent worked overtime where because of a deadline he had to

meet he could not be relieved; that he suffered from employment related "nervous strain," and that he suffered exhaustion as he repeatedly complained of feeling tired.

Further, it must be remembered that Dr. Talbot, decedent's personal physician, last saw him July 21, 1962, which was exactly four months before he died November 21st. Dr. Talbot's testimony was that of an honest man who could only testify to the possibilities of the effect of decedent's work as a cause of his death. His testimony was the basis for, and called for, application of the law's presumption favoring appellants.

The District Court (App. 14) also erroneously and incorrectly discounted and discredited Dr. Talbot's testimony, and thus ignored the law that the Act is to be construed liberally for the benefit of appellant dependents, and that doubts, including the factual, are to be resolved in their favor.

The District Court (App. 15) and Appellee Deputy Commissioner (App. 10) clearly, but erroneously and illegally, based their rejection of appellants' claims upon the testimony of Dr. Samual Dessoff. The District Court specifically held (App. 14) "that there is substantial evidence sustaining the Deputy Commissioner's decision, and that no error of law appears to have been committed by him." and both clearly ruled that Dr. Dessoff's testimony was such "substantial evidence."

Dr. Dessoff's testimony cannot be "substantial evidence" overcoming the evidence for appellants, and the Act's legal requirement that "it shall be presumed" "That he claim comes within the provisions of" the Act. This is so for the reason that Dr. Dessoff last saw decedent February 9, 1962 (App. 4, Tr . 181, 189), which was more than nine months before the latter's death on November 21, 1962. Dr. Dessoff merely testified to his guess as to the cause of decedent's death. Dr. Dessoff's statements on direct and cross-examination show the equivocal and unsubstantial nature of his views. (App. 4-6). He assumed that the Deceased Employee had atherosclerosis (App. 4, Tr. 184). "I wouldn't think his work had anything to do with" his death.

(App. 5, Tr. 194). This was a guess. Dr. Dessoff admitted in testifying in connection with decedent's death certificate, which attributed his death to "coronary insufficiency," that "Of course it would be awfully hard to try to estimate just what it was that he died from at that time." (App. 5, Tr. 199) He also admitted that the death certificate term "coronary insufficiency" is just a scrap bag into which everything is tossed and you don't know precisely what happened. These were admissions that Dr. Dessoff did not know the cause of the Deceased Employee's death. Dr. Dessoff's testimony, when read as a whole, left doubt as to what caused Employee Peregory's death, and this doubt was not, but should have been, resolved in favor of appellants.

Further, Dr. Dessoff, in connection with Stanley Cheseldine's testimony (App. 3, Tr. 152) that on Tuesday (November 20, 1962) Mr. Peregory was at his press gasping for breath about a minute and a half or so, and clapped his right hand over his heart, and (App. 3, Tr., 155) that Mr. Peregory on Wednesday (day of death) worked after 5 P. M., walked to his car, stopped, complained of pain and was breathing hard about two minutes and covered his left breast, that a man could very well be on the way to having a coronary thrombosis if he were at work, was a foreman in charge of getting out work by a deadline, was standing by his machine, and put his hand to his chest and appeared to be suffering shortness of breath (App. 5, Tr. 202).

Dr. Dessoff testified practically the same as decedent's Dr. Talbot when Dr. Dessoff testified (App. 5, Tr. 205) that coronary artery disease can be aggravated; that coronary artery disease can be aggravated by the effect of a man's work on his physical body and he has an attack of shortness of breath, and (App. 5, Tr. 208) that coronary artery disease can be aggravated and produce an acute coronary insufficiency.

Neither the District Court nor Appellee Deputy Commissioner resolved the inexcapable doubts as to the cause of Mr. Peregory's death in favor of his appellant-dependents in accordance with the Act created presumption and its implementing decisions.

The District Court erroneously approved and upheld the Appellee Deputy Commissioner's Compensation Order finding "That the employee's death was caused by his preexisting

coronary artery disease which was not caused or aggravated or otherwise adversely affected by the employment." (App. 11, Comp. Order 4).

The District Court erroneously approved and upheld the Appellee Deputy Commissioner's Compensation Order which erroneously and incorrectly rejected appellants' claims for the following reasons (App. 11, 12, Comp. Order 4, 5):

> 1. That the death of the employee did not result from injury or illness arising out of and in the course of the employment.
> 2. That the acute coronary insufficiency resulting in death was attributable to the preexisting coronary artery disease which was neither caused, aggravated, nor accelerated by the employment.

The District Court erroneously granted summary judgment for appellees, denied summary judgment for appellants, and dismissed appellants' action below with prejudice. (App. 16.)

SUMMARY OF ARGUMENT.

There is no substantial evidence in the record that Deceased Employee Peregory's death was due to any cause other than his work, and consequent the Act's presumption that appellants' claims come within the Act should have prevailed with judgment for appellants. The testimony of Dr. Dessoff, relied upon by Appellee Deputy Commissioner in his Compensation Order which REJECTED appellants' claims, and relied upon by the District Court in the MEMORANDUM (App. 13) on which the District Court's final decision, summary judgment ORDER (App. 16) is based, is not substantial evidence overcoming the Act's provision that "it shall be presumed" "That the claim comes within the provisions of" the Act. The testimony evidence for appellants was "substantial evidence," which was not actually contradicted and which was not inherently incredible. Consequently, it was erroneous and illegal to discredit appellants' evidence and hold it not credible. The District Court and Appellee Deputy Commissioner arbitrarily, erroneously and illegally discounted and discredited the evidence for appellants. The District Court's summary judgment should be reversed and the appellee Deputy Commissioner's Order should be set aside, with direction to award workmen's compensation death benefits to appellants.

ARGUMENT.

When Deceased Employee Peregory returned to Appellee Brady Company's employ on November 1, 1961, with coronary artery disease, and after having suffered from coronary artery disease, and after having suffered a heart attack, diagnosed as an acute antero-septal myocardial infarction, Appellee--employer Brady Company accepted Mr. Peregory with the frailities that predisposed him to bodily hurt. Vozzolo, Inc., v. Britton, USCtAppDC, 1965, 126 USCtAppDC 259 (pp. 262-263), 377 F2d 144.

The facts and circumstances in this case bring it within the operation of Section 20 of the Act (33 U.S.C.A. 920), which provides the principal basis of appellants' claims and appeal. Section 20 provides that "In any proceeding for the enforcement of a claim for compensation . . . It shall be presumed, in the absence of substantial evidence to the contrary -- that the claim comes within the provisions of" the Act.

Appellants' Statement of the Case shows that the alleged "substantial evidence" relied upon by the District Court and Appellee Deputy Commissioner as basis for rejection of appellants' claims is not in fact, and cannot be, substantial evidence overcoming the strong pre sumption favoring appellants' claims.

Appellants' claims fall squarely within the rationale of O'Keeffe, Deputy Commissioner, vs. Smith, Hinchman & Grylls Associates, Inc., et al., 1965, 380 US 359, 13 L ed 2d 895, 85 S Ct 1012, that the standard to be applied by the Deputy Commissioner does not require "a causal relation between the nature of the employment of the injured person and the accident;" "not is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer," but that "all that is required is that the obligations or conditions of employment create the 'zone of special danger' out of which the injury arose."

The rationale of the following cases in this Court, which rest their decisions strongly on the Act created presumption in favor of compensation, shows that the District Court and Appellee Deputy Commissioner fell into error; that they should

be reversed, and that compensation should be ordered for appellants:

Robinson v. Bradshaw, USCtAppDC, 1953, 92 USAppDC 216, 206 F2d 435.
Friend v. Britton, USCtAppDC, 1955, 95 USAppD.C. 139, 220 F2d 820.
Hancock v. Einbinder, USCtAppDC, 1962, 114 USAppDC 67, 310 F2d 872.
Lowell v. Einbinder, USCtAppDC, 1963, 121 USAppDC 312, 350 F2d 442.
Butler v. District Parking Management Co., USCtAppDC, 1965,
124 USAppDC 195, 363 F2d 682.
Vozzolo, Inc., v. Britton, 1967, 126 USApp. D. C. 259, 377F2d 144.

CONCLUSION.

Appellants submit that the summary judgment ORDER of the District Court should be overruled and reversed, and summary judgment for appellants be ordered, and that the Compensation Order - Rejection of Claim For Death Benefits of appellee Deputy Commissioner should be set aside, with direction that appellants' claims for workmen's compensation death benefits be allowed and paid to them.

Respectfully submitted,

H. Clay Espey,
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Attorney for appellants.

Certificate of Service.

I certify that I served copies of the foregoing Brief for Appellants and Their Appendix upon Hon. David G. Bress, United States Attorney, Joseph M. Hannon, Esq., and Mrs. Ellen Lee Park, Assistant United States Attorneys for appellee Deputy Commissioner William L. Massey, U. S. Court House, Washington, D. C., 20001, and upon Walter A. Fitzenberger, Esq., Attorney for appellee Robert J. Brady Company and Nationwise Mutual Insurance Company, Suite 421 Bender Bldg., 1120 Conn. Ave., N. W., Wash., D. C., 20036, by depositing said copies in the U. S. Mails, in envelopes so addressed, postage prepaid, at Washington, D. C., this 31st day of January, 1969.

H. Clay Espey,
Attorney for Appellants.

APPENDIX.

APPELLANTS' ANALYSIS OF THE TRANSCRIPT OF THE EVIDENCE, SHOWING THAT DENIAL TO THEM OF DEATH BENEFITS IS ERRONEOUS AND ILLEGAL.

(All emphasis by underscoring supplied by Appellants' attorney.)

There is no substantial evidence overcoming the law by Section 20 of the Act (33 U.S.C.A. 920) that "it shall be presumed, in the absence of substantial evidence to the contrary . . . That the claim comes within the provisions of" the Act.

The strongest evidence for appellees against appellants is the opinion testimony of Dr. Samual Dessoff, who last saw Deceased Employee Walter L. Peregory February 9, 1962, but who died nine months thereafter on November 21, 1962, that his death did not in anywise arise out of or in course of his employment. Dr. Dessoff's testimony is equivocal, weakened by cross-examination, and is not substantial evidence overcoming the statutory presumption favoring appellants. Tr., 180 et seq.

Appellees attempted to insinuate that domestic strife between Deceased Employee Peregory and his appellant wife contributed to his death, but appellees did not introduce any evidence to support their insinuations.

Tr. 5: Employee Walter L. Peregory died November 21, 1962. Death was caused by acute coronary insufficiency due to coronary artery disease.

Tr. 14: Appellant Mrs. Cora V. Peregory was sworn and testified:

Tr. 29: Employee Peregory returned to work in November 1961, after previous heart attack.

Tr. 31: Worked overtime.

Tr. 32: Decedent complained very much of being tired and fatigued and overworked.

Tr. 34: Decedent had chest pains during time that he worked overtime.

Tr. 35: Decedent was not feeling good on a Friday.

Tr. 36: This was a few days before his death on a Wednesday.

Tr. 36: Decedent "came home much worse on Monday."

Tr. 36: His breathing was not regular.

Tr. 37: Tuesday decedent was sick and he should have stayed home. He went to work sick on Tuesday.

Tr. 38: Wednesday - the day he died (November 21, 1962) - he was late getting home, later than usual. It was around 7:25 or 7:20 when he got home. Decedent ate his dinner; laid down complaining he was physically tired.

Tr. 40: Decedent was complaining Monday, Tuesday and Wednesday.

Tr. 42: These last three days he was under emotional stress as he had a special job to get out by a deadline he had to meet.

Tr. 43: Decedent did not work around his home. He came to bowling alley (where Mrs. Cora V. Peregory had preceded him) and fell over. He was pronounced dead at Casualty Hospital at 10:01 P. M.

Tr. 46: Decedent was in bowling alley less than ten minutes.

Tr. 60: Decedent died November 21, 1962.

Tr. 87: Stanley Cheseldine testified for appellants. He is a newphew of deceased employee. Worked with him in 1962.

Tr. 88: Cheseldine was hired around first part of September and worked with Deceased Employee Peregory up to his death. Deceased employee was Cheseldine's foreman.

Tr. 90: There was overtime work in the shop at times.

Tr. 91: Dr. Frank J. Talbot testified for appellants.

Tr. 92: Dr. Talbot testified to his qualifications. He is an Associate Fellow in the American College of Cardiology. Decedent Walter L. Peregory was his patient.

Tr. 93: Dr. Talbot first saw Mr. Peregory July 7, 1961, at Casualty Hospital. He had coronary artery disease - coronary insufficiency. On July 31, 1961, Mr. Peregory had sustained an acute anteroseptal wall myocardial infarction or coronary thrombosis.

Tr. 94: On check up visits to Dr. Talbot's office Mr. Peregory had chest pains related to emotional stress involved with his work. Dr. Talbot last saw decedent July 21, 1962.

Tr. 96: The emotional stress of Mr. Peregory's occupation had a definite bearing on the amount of angina pectoris he suffered.

Tr. 97: "It is my opinion the work may have contributed to his ultimate demise on November 21, 1962." (This brings into operation the statutory presumption favoring appellants.)

Tr. 109: A person who has coronary artery disease who is called upon for extra work which is unrelieved and unrelenting may suffer aggravation of a pre-existing coronary artery condition. In Mr. Peregory's heart condition pain indicates that he is overdoing.

Tr. 114, 115: Stress and continuous work may aggravate a coronary artery condition to the point of producing a heart attack - and death.

Appellants' Witness Cheseldine was recalled.

Tr. 144: Mr. Peregory lifted paper, weight 5 pounds to 50 and 60 pounds.

Tr. 149-150: Mr. Peregory did not feel good the last three days, Monday, Tuesday and Wednesday. He said he was not feeling good and he looked tired.

Tr. 152: On Tuesday Mr. Peregory was at his press gasping for breath for about a minute and a half or so.

Tr. 153: Mr. Peregory clapped his right hand over his heart.

Tr. 155: Mr. Peregory's face was drawn. Wednesday Mr. Peregory worked after 5 P. M. Walked to his car about two blocks. Mr. Peregory stopped, complained of pain and was breathing hard; this about two minutes; he covered his left breast.

Tr. 158: Mr. Peregory took pills after he got into his car. Mr. Peregory took Witness Cheselaine to his home about 7 P. M.

Tr. 165: Mr. Peregory worked overtime November 19th, 20th and 21st.

Tr. 174: Mr. Peregory went up and down stairs.

Tr. 175: He did so quite a few times. Sometimes he walked and sometimes he "zipped up."

Dr. Samual Dessoff testified as appellees' witness:

(Dr. Dessoff testified at page 105 of the transcript of his testimony March 26, 1962, in response to the question "In discussing Mr. Peregory's condition with him, did you go into his working conditions, . . ." answered "I knew he was a printer but I didn't go into it very much more than that.")

Tr. 180: Since 1931 has practiced internal medicine and cardiology.

Tr. 181: He examined Mr. Peregory February 9, 1962 (the last time Dr. Dessoff saw hims before his death November 21, 1962).

Tr. 182: Mr. Peregory had had an anteroseptal myocardial infarction; electrocardiogram showed healed manifestations.

Tr. 182: Mr. Peregory had suffered a blockage of one of his coronary arteries which affected the muscle of the heart in the area of the septum and had produced what is known as an infarction. In other words, the death of an area of the muscle in this location.

Tr. 183: Q. What is a coronary occlusion?

A. It's a blockage of the circulation of one of the coronary arteries.

Tr. 183: A clot forming within the blood vessel itself is a coronary thrombosis.

The usual cause of a coronary occlusion is a thrombosis, which is a clot.

Tr. 184: A. Theoretically, one assumes that for some period before the clot occurred there was disease of the internal lining of the coronary artery. This is known as atherosclerosis.

Tr. 184: Q. Was there any evidence of atherosclerosis in Mr. Peregory's case?

A. We assume that he had that.

Tr. 189: Dr. Dessoff did not see Mr. Peregory after February, 1962.

Tr. 192: "In your expert medical opinion would the job, his occupation,

be a contributing or aggravating cause of this death?

(Additional factors were stated to witness.)

Tr. 194: " . . . I wouldn't think his work had anything to do with it (Mrs. Peregory's death).

Tr. 194: Overtime work on occasions would not aggravate Mr. Peregory's condition.

Tr. 199: Q. What is your medical opinion as to the nature of that coronary problem (The cause of Mr. Peregory's death November 21, 1962).

A. Of course it would be awfully hard to try to estimate just what it was that he died from at that time.

The death certificate term "coronary insufficiency" is just a scrap bag into which everything is tossed and you don't know precisely what happened.

(Yet Appellee Deputy Commissioner, disregarding the legal presumption favoring appellants, rejected appellants' claims upon his arbitrary, unsupported ruling "That the acute coronary insufficiency resulting in death was attributable to the preexisting coronary artery disease which was neither caused, aggravated, nor accelerated by the employment."

Tr. 200: Dr. Dessoff admitted he could not say definitely that Mr. Peregory had atherosclerosis; he assumed it was present.

Tr. 200-201: Dr. Dessoff's whole testimony based upon the proposition that Mr. Peregory did have atherosclerosis.

Tr. 202: Doctor, if a man were at work and he was a foreman in charge of getting out the work by a deadline and should be standing by his machine and put his hand to his chest and appeared to be suffering shortness of breath, what would be happening to him?

A. He could be/very well on the way to have a coronary thrombosis at that moment.

Tr. 205: Doctor, can coronary artery disease be aggravated? A. Yes.

Tr. 205: Can coronary artery disease be aggravated by the effect of a

man's work on his physical body? A. If the man is working has has attacks of angina and has to take nitoglyscerine or has an attack of shortness of breath during his work, then we think that he probable is doing things he should not be doing.

Tr. 206: Could an acute coronary insufficiency based upon a coronary artery disease be in anywise induced by the strain of that man's work on that particular individual? A. It would be --

Tr. 207: Things can aggravate coronary artery disease all the time . . .

Tr. 208: Q. Proposition is that a coronary artery disease can be aggravated and produce an acute coronary insufficiency? A. Yes, of course it can.

Milton Lee Bussius (appellant) testified for appellants.

Tr. 212: He worked with Mr. Peregory on Saturdays to keep up with the work, to keep it on schedule so that it would not get behind. This Saturday work was necessary to keep up with deadlines.

Tr. 214: In November, 1962, Mr. Peregory was very worried about his work.

Tr. 214: Witness last worked Saturday before Mr. Peregory died. Mr. Peregory was tired and confused.

Tr. 217: Worked Saturday, November 17, 1962.

Tr. 217-218: Witness Bussius did not have a time card then.

Mrs. Janoff (sister of Appellant Cora V. Peregory) testified for appellants.

Tr. 235: Mr. Peregory began to complain of feeling tired.

Tr. 236: His personal appearance deteriorated.

Tr. 238: Mrs. Peregory's condition of tiredness and disarray continued up to his death.

Tr. 239: Mr. Peregory sat down in bowling alley.

Tr. 240: He slumped to the floor.

Tr. 247: Mr. Peregory complained that his work was getting too much for him and he applied for a supervisory job in Florida.

Mrs. Cora V. Peregory (appellant) testified for appellants.

Tr. 259: There was no family discussion as to bills. Mrs. Peregory paid the bills.

Tr. 261: Prince George's County Circuit Court action was settled out of court. Columbia Savings and Loan was involved.

Tr. 262: "Everything was peaceably settled."

Tr. 265: Mr. Peregory died on Wednesday. It was 7 or 7:30 when he came home.

Tr. 266: It was around 7:30 those (last) three days when he came home.

Robert J. Brady, Jr., testified for appellees:

Tr. 278: Mr. Peregory would see that the work would get out.

Tr. 291. Mr. Peregory was installed in the Q Street plant the beginning of September 1962 (upon moving from the M Street, N. W., discontinued plant).

Tr. 324. Mr. Walter Peregory operated the big press.

Tr. 326: There were times when Decedent Walter Peregory was the only pressman (employed by Brady Company).

Milton Lee Bussius (appellant) testified for appellants.

Tr. 330: In fall of 1962 Decedent Walter L. Peregory operated the big press, and on Saturday. He lift paper size of a blotter.

Tr. 331: The paper was "pretty heavy." Decedent Peregory lifted packages of paper for the big press.

Tr. 332: Mr. Brady, Jr., was not there every Saturday.

Tr. 333: Packages of paper weighed 75 pounds and up.

Tr. 336: Decedent Peregory operated both presses, small press more than the big press.

(Appellants submit that Appellee Deputy Commissioner ignored the statutory presumption that appellants' claims come within the Act and are compensable; that he arbitrarily and illegally held incredible testimony of appellants' witnesses which was not contradicted and was not inherently incredible; and that he arbitrarily and without support in the record rejected appellants' claims upon his arbitrary and unsupported finding and ruling that Decedent Peregory's death was caused by his preexisting coronary artery disease which was not caused or aggravated or otherwise adversely affected by the employment; that the acute coronary insufficiency resulting in death was attributable to the preexisting coronary artery disease which was neither caused, aggravated, nor accelerated by the employment.)

UNITED STATES DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION

DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act (Walter L. Peregory, deceased employee) CORA VIRGINIA PEREGORY, surviving widow and MILTON LEE BUSSIUS, surviving minor child Claimants vs. ROBERT J. BRADY CO., INC., (DBA LITHOGRAPHIC PHOTOGRAPHIC SERVICES, INC. Employer NATIONWIDE MUTUAL INSURANCE COMPANY Insurance Carrier	COMPENSATION ORDER REJECTION OF CLAIM FOR DEATH BENEFITS CASE No. 20475-6 Fatal

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and hearings having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

1. That on November 21, 1962, Walter L. Peregory, hereinafter referred to as "employee" was in the employ of the employer above named, whose address is 130 Q Street, Northeast, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or

death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes; that the liability of the employer for compensation under the said Act was insured by Nationwide

Mutual Insurance Company;

2. That the employee was employed by the employer as an offset pressman; that his duties entailed the operation of an offset press and supervision of the work of one other pressman, and a bindery worker; that he was responsible for production in the pressroom once an assignment had been given to him;

3. That on November 21, 1962, the employee arrived home at approximately 7:20 p.m., had his evening meal, and retired, complaining of feeling physically tired; that upon awaking shortly thereafter, he proceeded to a bowling alley, having been preceded by his wife; that upon his arrival at the bowling alley, he inquired of his wife, in a voice loud enough to attract the attention of others, as to why she did not wait for him; that shortly thereafter, while sitting alone at a table he slumped to the floor and was pronounced dead on arrival at the hospital at approximately 10:00 p.m.; that death was caused by acuto coronary insufficiency due to coronary artery disease;

4. That on June 19, 1963, claim for compensation on account of death was filed by Mrs. Cora Peregory on her own behalf as widow of the employee and on behalf of Milton Lee Bussius, her minor son, alleging that the death of the employee resulted from aggravation by his work on and after November 1, 1961, of a preexisting heart condition;that the said claim, as amended on June 29, 1964, was filed within one year from the date of death;

5. That for several years prior to November 21, 1962, the employee

suffered from coronary artery disease, and that between July 24, 1961 and July 31, 1961, while in the employ of the employer herein, he suffered a

heart attack which (on August 1, 1961) was diagnosed as an acute antero-septal myocardial infarction; that thereafter, the employee filed claim for compensation under the District of Columbia Compensation Act, alleging that the said illness beginning July 24, 1961 arose out of and in the course of his employment; that a hearing was held on the said claim and on May 17, 1963, after the death of the employee, a compensation order was filed rejecting the claim for the reason that he did not suffer an injury or illness arising out of and in the course of the employment; that following the said heart attack in July, 1961, the employee returned to work for the employer herein on November 1, 1961;

6. That after November 1, 1961, the employee continued to perform the usual duties of a pressman, which included loading the presses with reams of paper, which varried in weight from 5 to 50 pounds; that from August, 1962 to November 7, 1962, the employee worked an average of 47 hours per week over a 6 day-week period; that for the 2 weeks immediately preceding his death, including the date of death, the employee did not work in excess of 8 hours per day or 5 days per week; that there was no testimony that the employee made any complaints to his superiors after November 1, 1961 of suffering from chest pains or difficulty in breathing while performing his work as a pressman; that there was no credible testimony that during the said period, the employee was subject to any employment related emotional disturbance or any significant physical exertion;

7. That the employee was examined on February 9, 1967 by a specialist in cardiology who testified that at that time, the employee

related that he was able to do his work without difficulty, that he did

not have to take nitroglycerine while at work and that he did not have angina and shortness of breath while at work;

8. That from November 1, 1961 to July 21, 1962, the employee remained under the care of his personal physician; that the said physician's testimony and opinion that the employee's coronary artery disease may have been aggravated by his work is equivocal and conjectural as there was no credible evidence that the employee at any time "worked extra long hours where he could not be relieved", or that he ~~was~~ suffered from employment related "nervous strain", "overwork" or "exhaustion"; that the said physician testified that when the employee was last seen in July, 1962, he had been free of angina for approximately one month prior thereto and he saw no reason to hospitalize him; that the said physician did not advise the employee to restrict his work activity because of his coronary artery disease; that after July 21, 1962, the employee was not treated or examined by any physician because of his coronary artery disease;

9. That the employee's death was caused by his preexisting coronary artery disease which was not caused or aggravated or otherwise adversely affected by the employment.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claims of Mrs. Cora Virginia Peregory and Milton Lee Russius, for death benefits be, and they are hereby REJECTED for the following reasons:

1. That the death of the employee did not result from injury or illness arising out of and in the course of the employment;

2. That the acute coronary insufficiency resulting in death was attributable to the preexisting coronary artery disease which was neither caused, aggravated, nor accelerated by the employment.

Given under my hand and filed at Washington, D. C.,
this thirteenth day of June, 1967

(S) Wm. L. Massey

Deputy Commissioner
District of Columbia Compensation District

PROOF OF SERVICE.

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimants, the employer, the insurance carrier, the attorney for the claimants and the attorney for the respondents at the last known address of each as follows:

NAME	ADDRESS
Mrs. Cora V. Peregory	3857 Saint Barnabas Road Apartment 102 Marlow Heights, Maryland
Robert J. Brady Co., Inc., (DEA Lithographic Photographic Services, Inc.)	3227 M Street, N. W., Washington, D. C.
Nationwide Mutual Insurance Company	Suite 302 Willco Building 7826 Eastern Avenue, N. W., Washington, D. C.
DeShazo and Espey, Esqs.	Southern Building, Washington, D. C.
Bond L. Holford, Esq.	3906 Rhode Island Avenue Brentwood, Maryland

(S) Wm. L. Massey

Deputy Commissioner

Mailed: June 13, 1967.

(Appellants submitted that the District Court ignored the statutory presumption that appellants' claims come within the Act and are compensable; and that the District Court erroneously held the testimony of appellees' medical expert, based upon his examination of Decedent Peregory on February 9, 1962, more than nine months prior to the latter's death on November 21, 1962, to be "substantial evidence" which overcame the statutory presumption favoring appellants' claims.)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CORA VIRGINIA PEREGORY
and
MILTON LEE BUSSIUS,

PLAINTIFFS

v.

William H. HASSEY,
Deputy Commissioner etc.

ROBERT J. BRADY CO., INC.,

and

...TIONAL MUTUAL INSURANCE CO.,

DEFENDANTS.

Civil Action

No. 1784-67

FILED
April 29, 1968.

MEMORANDUM

This is an action under 33 U.S.C. §921, to set aside a decision of the Deputy Commissioner of the Bureau of Employees' Compensation, which denied the claim of a widow and minor child for workmen's compensation for death, under the Longshoremen's and Harbor Workers' Compensation Act, which constitutes the Workmen's Compensation Act for the District of Columbia. The matter is before the Court at this time on cross-motions for summary judgment. The principal contested issue was whether the death of the deceased arose out of and in the course of his employment. The Deputy Commissioner decided this question in the negative.

2.

An examination of the record leads the Court to the conslusion that the evidence on this crucial issue was conflicting; that there is substantial evidence sustaining the Deputy Commissioner's decision; and that no error of law appears to have been committed by him.

The salient facts concerning the death of the deceased are not disputed. The deceased, Walter L. Peregory was a foreman in a lithographic shop and was in charg of its off-set printing activities. In July 1961, he had suffered an onset of heart disease, but eventually was able to return to his employment. He filed a claim for compensation, which was denied on the ground that the illness did not arise out of, or in the course of his employment. In an action brought in this Court, this denial was sustained by this Court.

On November 21, 1962, the deceased arrived home from work, and after having dinner, he went to a bowling alley. While there he had another heart attack which was immediately fatal. As already stated, the only question in controversy was whether the fatal heart attack arose out of and in the course of his employment, - a question the Deputy Commissioner decided adversely to the claimants.

On this issue the evidence was sharply conflicting. While the facts were undisputed, the conclusion to be drawn from them in in controversy. Two cardiologists gave expert testimony on this issue. Dr. Tolbot, who had been the physician of the deceased, expressed the opinion that his "work may have contributed to his death" (Tr. p. 97). He

3.

further stated that his coronary condition might have been aggravated by unrelieved work and emotional stress (Tr. p. 139). It is important to note that Dr. Talbot, although a physician of the deceased, was not willing to state categorically that his work contributed to his death, or aggravated his condition. He apparently was in doubt because he stated that this might have been the case.

Dr. Dessoff, who was called as an expert witness by the insurance carrier and the employer, testified: "I don't think his work had anything to do with" his de (Tr., p. 194). Against, he repeated that, "Categorically the job had nothing to do with" his death (Tr. p. 200).

Naturally the Deputy Commissioner had the advantage of seeing, hearing and observing the witnesses. He accepted Dr. Dessoff's views rather than Dr. Talbot's. This he had a right to do. No reason is discernible for overruling him considering the limited authority of this Court to set aside administrative decisions.

Counsel for the plaintiffs vigorously urges that the Deputy Commissioner ignored the provision of law to the effect that it shall be presumed that a claim for compensation comes within the Act. 33 U.S.C . §920. The record does not bear out this contention. The mere fact that the Deputy Commissioner did not mention the presumption, does not justify an inference that he ignored it. By necessary implication, it must be assumed from his decision that he concluded that there was sufficient evidence to overcome the presumption.

The defendants' motion for summary judgment is granted, and the plaintiffs' counter motion is denied.

(s) Alexander Holtzoff

United States District Judge

April 29, 1968.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CORA VIRGINIA PEREGORY, Surviving Widow of Walter L. Peregory, Deceased Employee

and

MILTON LEE BUSSISU, Her Surviving Minor Child by said Cora Virginia Peregory as Mother and Next Friend,

Plaintiffs

v.

WILLIAM L. MASSEY, Deputy Commissioner

ROBERT J. BRADY CO., INC. d/b/a/ Lithographic Photographic Services, Inc.

NATIONWIDE MUTUAL INSURANCE COMPANY

Defendants.

Civil action No. 1784-67.

ORDER

Upon consideration of the motion for summary judgment filed by defendant deputy commissioner, William L. Massey, the cross-motion for summary judgment filed by plaintiffs, and the opposition to plaintiffs' motion filed by defendants Robert J. Brady Co., Inc., and Nationwide Mutual Insurance Company, together with the oral argument of counsel, the court finds that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law, and it is this 9 day of May, 1968,

ORDERED that the defendant deputy commissioner's motion for summary judgment be and the same hereby is granted;

ORDERED that the plaintiffs' cross-motion for summary judgment be and the same hereby is denied; and it is

FURTHER ORDERED that the action be and the same hereby is dismissed with prejudice.

(s) Alexander Holtzoff
United States District Judge

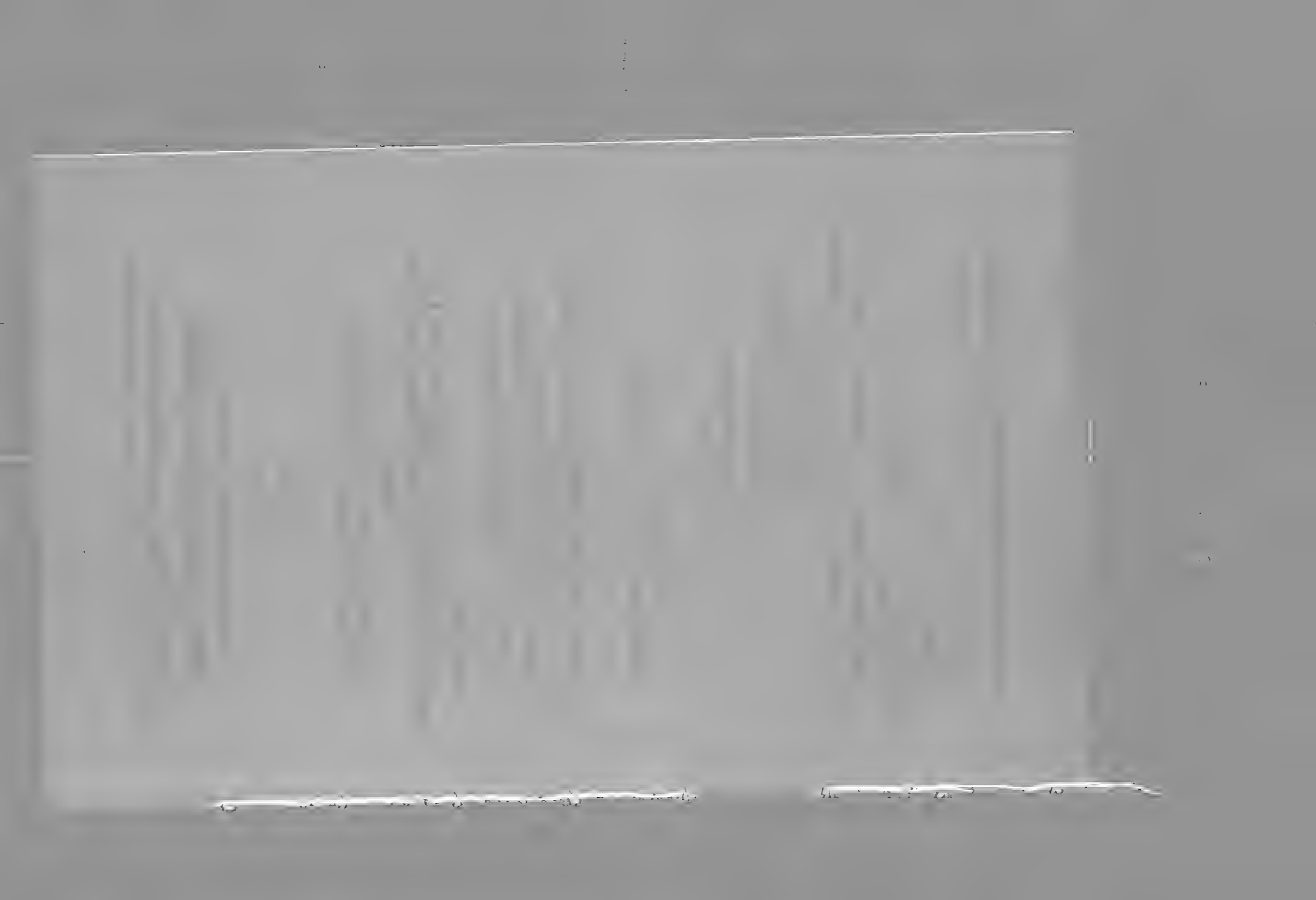

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TABLE OF CASES

STATUTES

ISSUE PRESENTED

In the opinion of appellee deputy commissioner, the sole issue presented is whether the record, considered as a whole, and the reasonable inferences to be drawn therefrom, supports the deputy commissioner's finding that the employee's death was not related to his employment but resulted from causes unrelated thereto.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,104

CORA VIRGINIA PEREGORY, Surviving Widow of Walter L. Peregory, Deceased Employee

and

MILTON LEE BUSSIUS, Her Surviving Minor Child by said Cora Virginia Peregory as Mother and Next Friend, APPELLANTS

v.

WILLIAM L. MASSEY, Deputy Commissioner

ROBERT J. BRADY CO., INC. d/b/a Lithographic Photographic Services, Inc.

NATIONWIDE MUTUAL INSURANCE COMPANY, APPELLEES

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE APPELLEE DEPUTY COMMISSIONER

COUNTERSTATEMENT OF THE CASE

This cause arose upon an action instituted by appellants, plaintiffs below (as so referred to hereinafter), to

review and set aside, as not in accordance with law, a compensation order filed by William L. Massey, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, on June 13, 1967, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D.C. Code 36-501. Plaintiffs claimed death benefits were due them as the survivors of Walter L. Peregory (referred to hereinafter as "employee" or "deceased").

In that order, the deputy commissioner rejected the claim for death benefits filed by the plaintiff, Cora Virginia Peregory, on her own behalf as widow of the deceased and on behalf of plaintiff, Milton Lee Bussius, a minor boy to whom the deceased stood in loco parentis for one year prior to death. Rejection was based upon the deputy commissioner's finding that the employee's fatal injury did not arise out of or occur in the course of his employment. The complaint filed in the Court below alleged, in effect, that the record did not support the deputy commissioner's finding.

During his lifetime, namely, on August 21, 1961, the employee had himself filed a claim against his employer, Robert J. Brady Co., Inc., for disability benefits under the District of Columbia Workmen's Compensation Act. He alleged that on July 24, 1961, while performing services for the employer, he had suffered a disabling heart attack which was asserted to have been causally related to the working conditions of his employment. Hearings on the employee's claim for alleged disability were held before Herman Adler, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, on March 26, 1962 and March 6, 1963. The employee died on November 21, 1962, prior to the 1963 hearing. Thereafter, a compensation order was issued by Deputy Commissioner Adler on May 17, 1963, rejecting the claim

for disability benefits with respect to which the plaintiff-widow had sought to recover for herself in the place of the deceased. The deputy commissioner's rejection of disability benefits was based on his finding that the evidence of record disclosed that the heart condition was not employment related. This earlier rejection was, on appeal by the widow to the United States District Court for the District of Columbia, sustained on April 17, 1964 in Civil Action No. 1518-63. No further judicial review was sought.

On June 19, 1963, while the foreging rejection of disability compensation was pending review in District Court, plaintiff, Mrs. Peregory, filed a claim for death benefits for herself and the boy with the deputy commissioner. In this claim, she alleged that the employee's death was due to aggravation of his pre-existing heart condition as the result of work following the employee's return to his job in November 1961, after the heart attack of July 1961 which had been found to be non-employment related. Hearings were held on this later death benefit claim before the appellee, Deputy Commissioner Massey, on February 23 and April 13, 1967, during which the record of the hearings in the earlier disability claim were incorporated by reference. Following the 1967 death benefits hearings, the appellee deputy commissioner, on June 13, 1967, issued his compensation order rejecting the claim. Rejection was predicated upon findings that the employee's death was not the result of any employment-related injury or illness, but was due, instead, to a pre-existing heart condition which had not been aggravated by the employment.

Thereafter, the complaint in the present action was filed in the Court below taking issue with those findings. The deputy commissioner responded by filing a motion for summary judgment. Upon review of the record, the deputy commissioner's findings and compensation order were sustained by the lower Court which granted summary judgment in favor of the deputy commissioner and denied plaintiffs' cross motion for such judgment. This appeal followed dismissal of the action below.

THE COMPENSATION ORDER

The compensation order complained of reads, in pertinent part, as follows:

> Such investigation in respect to the above-entitled claim having been made as is considered necessary, and hearings having been duly held in conformity with law, the Deputy Commissioner makes the following
>
> FINDINGS OF FACT
>
> 1. That on November 21, 1962, Walter L. Peregory, hereinafter referred to as "employee" was in the employ of the employer above named, whose address is 130 Q Street, Northeast, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employment in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by Nationwide Mutual Insurance Company;
>
> 2. That the employee was employed by the employer as an offset pressman; that his duties entailed the operation of an offset press and supervision of the work of one other pressman, and a bindery worker; that he was responsible for production in the pressroom once an assignment had been given to him;
>
> 3. That on November 21, 1962, the employee arrived home at approximately 7:20 p.m., had his evening meal, and retired, complaining of feeling physically tired; that upon awaking shortly thereafter, he proceeded to a bowling alley, having been preceded by his wife; that upon his arrival at the bowling alley, he inquired of his wife, in a voice loud enough to attract the attention of others, as to why she did not wait for him; that shortly thereafter, while sitting alone at a table he slumped to the floor and was pronounced dead on arrival at the hospital at approximately 10:00 p.m.; that death was caused by acute

coronary insufficiency due to coronary artery disease;

4. That on June 19, 1963, claim for compensation on account of death was filed by Mrs. Cora Peregory on her own behalf as widow of the employee and on behalf of Milton Lee Bussius, her minor son, alleging that the death of the employee resulted from aggravation by his work on and after November 1, 1961, of a preexisting heart condition; that the said claim, as amended on June 29, 1964, was filed within one year from the date of death;

5. That for several years prior to November 21, 1962, the employee suffered from coronary artery disease, and that between July 24, 1961 and July 31, 1961, while in the employ of the employer herein, he suffered a heart attack which (on August 1, 1961) was diagnosed as an acute anteroseptal myocardial infarction; that thereafter, the employee filed claim for compensation under the District of Columbia Compensation Act, alleging that the said illness beginning July 24, 1961 arose out of and in the course of his employment; that a hearing was held on the said claim and on May 17, 1963, after the death of the employee, a compensation order was filed rejecting the claim for the reason that he did not suffer an injury or illness arising out of and in the course of the employment; that following the said heart attack in July, 1961, the employee returned to work for the employer herein on November 1, 1961.

6. That after November 1, 1961, the employee continued to perform the usual duties of a pressman, which included loading the presses with reams of paper, which varied in weight from 5 to 50 pounds; that from August, 1962 to November 7, 1962, the employee worked an average of 47 hours per week over a 6 day-week period; that for the 2 weeks immediately preceding his death, including the date of death, the employee did not work in excess of 8 hours per day or 5 days per week; that there was no testimony that the employee made any complaints to his superiors after November 1, 1961 of suffering from chest pains or difficulty in breathing while performing his work as a presssman; that there was no credible tes-

timony that during the said period, the employee was subject to any employment related emotional disturbance or any significant physical exertion;

7. That the employee was examined on February 9, 1962 by a specialist in cardiology who testified that at that time, the employee related that he was able to do his work without difficulty, that he did not have to take nitroglycerine while at work and that he did not have angina and shortness of breath while at work;

8. That from November 1, 1961 to July 21, 1962, the employee remained under the care of his personal physician; that the said physician's testimony and opinion that the employee's coronary artery disease may have been aggravated by his work is equivocal and conjectural as there was no credible evidence that the employee at any time "worked extra long hours where he could not be relieved", or that he suffered from employment related "nervous strain", "overwork" or "exhaustion"; that the said physician testified that when the employee was last seen in July, 1962, he had been free of angina for approximately one month prior thereto and he saw no reason to hospitalize him; that the said physician did not advise the employee to restrict his work activity because of his coronary artery disease; that after July 21, 1962, the employee was not treated or examined by any physician because of his coronary artery disease;

9. That the employee's death was caused by his preexisting coronary artery disease which was not caused or aggravated or otherwise adversely affected by the employment.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claims of Mrs. Cora Virginia Peregory and Milton Lee Bussius, for death benefits be, and they are hereby REJECTED for the following reasons:

1. That the death of the employee did not result from injury or illness arising out of and in the course of the employment;

2. That the acute coronary insufficiency resulting in death was attributable to the preexisting coronary artery disease which was neither caused, aggravated, nor accelerated by the employment.

SUMMARY OF ARGUMENT

Since there is substantial evidence in the record considered as a whole, including the reasonable inferences to be drawn therefrom, which supports the deputy commissioner's factual finding that the employee's death did not arise out of and in the course of his employment, the Court below correctly concluded that this finding was to be accepted upon judicial review. *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359 (1965); *Banks* v. *Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968), reh. denied 391 U.S. 929; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Foster* v. *Massey* (No. 21,480), U.S. App. D.C. , F.2d (May 29, 1968), clarified, U.S. App. D.C. , F.2d (September 24, 1968); *Wolff* v. *Britton*, 177 U.S. App. D.C. 209, 328 F.2d 181 (1964); *Hurley* v. *Lowe*, 83 U.S. App. D.C. 123, 168 F.2d 553 (1948), *cert. denied* 334 U.S. 828; *Groom* v. *Cardillo*, 73 App. D.C. 358, 119 F.2d 697, 698 (1941); *Gooding* v. *Willard*, 209 F.2d 913, 916 (2d Cir. 1954).

ARGUMENT

The deputy commissioner's finding that the employee's death was not employment related is supported by the record considered as a whole and is not irrational.

(a) *Scope of Review*

The standard for judicial review in cases arising under the Longshoremen's Act has been carefully delineated by the Supreme Court. If the findings of the deputy commissioner are supported by substantial evidence, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Banks* v. *Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S.

459 (1968), reh. denied 391 U.S. 929, or if the deputy commissioner's holding is not irrational, *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359, 363 (1965), or if the order under review is not "forbidden by the law", *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947), the decision of the deputy commissioner is to be sustained. The fact that the evidence may permit the drawing of diverse inferences will not warrant disturbing the inference or inferences drawn by the deputy commissioner if his selection is reasonable. *Cardillo* v. *Liberty Mutual Insurance Co., supra; Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935); *Voehl* v. *Indemnity Ins. Co.*, 288 U.S. 162 (1933).

These principles have found acceptance by this Court in numerous cases under the Longshoremen's Act, *Foster* v. *Massey* (No. 21,480), U.S. App. D.C. , F.2d (May 29, 1968), clarified, U.S. App. D.C. , F.2d (September 24, 1968); *Wolff* v. *Britton*, 177 U.S. App. D.C. 209, 328 F.2d 181 (1964), even though the Court, as it said, "might have reached a different conclusion", *Groom* v. *Cardillo*, 73 App. D.C. 358, 119 F.2d 697, 698 (1941), or even in situations where "the Deputy Commissioner was in error as to the legal content of the [statutory] term" involved for consideration on review, *Hurley* v. *Lowe*, 83 U.S. App. D.C. 123, 168 F.2d 553, 556 (1948), *cert. denied* 334 U.S. 828. In the latter case the Court relied upon *Cardillo* v. *Liberty Mutual Insurance Co., supra*, 330 U.S. 469 (1947), wherein the Supreme Court had observed that it was immaterial that a deputy commissioner's finding, based upon an inference, was "more legal than factual."

A review of the record here discloses that the deputy commissioner's determination was properly sustained by the District Court.

(b) *The Evidence*

The record in the instant case consists of the typewritten transcript of the administrative hearings held before

the deputy commissioner on February 23 and April 13, 1967, with exhibits. With reference to the sole issue which is the subject of review, namely, whether the employee's death was related to his employment, witnesses testified in part and in effect as follows:

CORA V. PEREGORY (claimant): That the employee worked for Brady and Company "close to four years" when he died, having previously worked for the Washington Post newspaper for 20 years (T. 17);[1] that following the employee's heart attack in July 1961 (which, as noted hereinbefore, was the subject of an earlier claim of the employee for disability compensation, and which was rejected by the deputy commissioner whose decision was sustained by the District Court for the District of Columbia in an appeal brought by the plaintiff-widow)[2] and his return to work in November 1961, he continued to do the same work as he did before the heart attack (T. 19-20, 28); that on the Friday before his death, which occurred on the following Wednesday, the employee had worked overtime that day and, for a shorter time, again on Saturday (T. 36);[3] that on the day he died the employee, following his customary pattern of relaxing after eating his evening meal, went to bed; that the witness left him to go bowling with her sister (T. 43-44); that later the employee walked into the bowling alley and loudly berated

[1] T. refers to the typewritten transcript of the proceedings before the deputy Commissioner.

[2] At the outset of the death benefits hearing before the deputy commissioner on February 23, 1967, prior to the reception of evidence, the transcript of the proceedings in the earlier disability claim and the compensation order of May 17, 1963, holding that the injury was unassociated with employment, were incorporated by reference into the administrative file of the present claim (T. 5). That transcript, which had previously been filed in Civil Action No. 1518-63 in the District Court when the disability claim was there reviewed and denied efficacy, was refiled in the instant case and, accordingly, made a part of the record here under review.

[3] Contrary to this testimony of the witness, the employee's actual time cards, admitted into evidence at the earlier hearings, show no work on that Saturday and no overtime hours on the final Friday, Monday, Tuesday, or Wednesday.

the witness for having left the house without waiting for him (T. 44-45); that shortly thereafter, *"less than ten minutes" later*, while sitting alone at a table in the bowling alley, the employee collapsed and was pronounced dead at Casualty Hospital (T. 44, 45-46); that the employee had experienced pains in his chest and was nervous not only after his return to work in November 1961 but even *before* his July 1961 heart attack; that he expressed complaints of pain in his right arm both *before* July 1961 and after November 1961 (T. 58-60); that the employee had suffered a heart attack shortly before they were married in June 1957 (T. 73); that the employee suffered another heart attack around August 1960 (T. 75); that after the July 1961 attack, the employee's doctor advised him to stop smoking (T. 79-80) but did not tell him to stop work (T. 81); that the witness cannot "honestly say" that the employee worked more overtime after his return to work than he did before (T. 83); that marital difficulties between the witness and the employee had been the subject of a conference with the employee's physician, Dr. Talbot (T. 271-273).[4]

SAMUEL DESSOFF (an internist and cardiologist, T. 180): That he examined the employee on February 9, 1962, and obtained the employee's medical history (T. 181);[5] that, based on an electrocardiogram taken by the witness at that time and a review of the employee's medical records, the witness diagnosed an anteroseptal myocardial infarction showing "healed manifestations"; that probably around mid-July of 1961 the employee had suffered a blockage of a coronary artery which killed a portion of the heart muscle and produced the infarction (T. 182); that normally the blockage is caused by a clot, or coronary thrombosis, created by disease of the internal lining of the coronary artery, or atherosclerosis, which has

[4] During cross examination, many inconsistencies between claimant's prior testimony (at the disability compensation hearing) and her present testimony (at the death benefits hearing) were pointedly observed.

[5] Dr. Dessoff related the history obtained from the employee as contained in the doctor's testimony at the earlier disability hearing.

been "going on for some time"; that in view of the employee's history of coronary thrombosis over *six years* "one assumes that he had atherosclerosis for at least that period of time"; *that atherosclerosis is "progressive" and influenced by several factors including "heredity, the presence of a high blood cholesterol, obesity, high blood pressure, diabetes and smoking"* (T. 182-185, 200-201); *that tension or emotional upset is not considered important enough to be included* (T. 186); that atherosclerosis "naturally" gets worse as the individual grows older (T. 188); that at the time of the examination in February 1962 the employee indicated that he "was able to do his work without any difficulty" and "did not have angina or shortness of breath at work"; that while on occasions when walking in cold weather or uphill the employee had a "heaviness" in his chest, no such symptoms occurred on the job (T. 190); that from the employee's history, the witness saw *no reason why the employee could not have returned to his work following the coronary attack of July 1961;* that from the circumstances of the employee's returning to the same job and performing the same function for the same number of days and hours as before, coupled with the witness' examination and the employee's history related by the employee in February 1962, *the witness could say "with a full degree of certainty" that the work had not aggravated the employee's coronary condition* (T. 191); that considering the employee's activities on the day he died, including an incident of pain suffered and medication taken at work, it was the witness' opinion, derived from the fact that the employee had been doing his usual type of work, *that the work had nothing to do with the heart attack which took place in the bowling alley and which killed him* (T. 194); *that the witness "would state categorically that the job had nothing to do with it"* (T. 200); *that agitation or emotion have no bearing on the progression of atherosclerosis; that if a person has a severe attack "within five or ten minutes" after becoming agitated, there is then a cause and effect relationship be-*

tween the agitation and the attack (T. 195);[6] that (in the realm of tension) having an argument with one's wife is "much more important than . . . the so-called tension that one is liable to have while at work doing something that you have done day in and day out" (T. 196); that death from "coronary insufficiency", as shown on the employee's death certificate, "is just a scrap bag into which everything is tossed and you don't know precisely what happened"; that it can represent "a rapid irregularity of the heart", without any relation to a coronary thrombosis, causing a person to die 5 to 6 minutes later; that it could also represent a ventricular tachycardia or ventricular fibrillation of a cardiac standstill (T. 199); that "the only way we can judge as to whether work had anything to do with it is that shortly after some more-than-usual physical effort or some particular mental or emotional agitation produced within a very short period of time, *30 minutes to maybe an hour*, a heart attack" occurred (T. 201-202); *that "the heart attack would have to come almost together with whatever exertion or mental agitation he had";* that merely because an employee may have experienced a chest pain at work and was short of breath on the day he died does not necessarily mean that his work caused such discomforts, especially when he continues with his work; that since these same symptoms could have been felt while the employee was lying quietly in bed, there is nothing to suggest that his work had anything to do with those symptoms (T. 202-203); *that if the employee were having a coronary thrombosis "it wouldn't make any difference whether he continued to work or didn't continue to work"* (T. 204); *that if work were producing a coronary insufficiency "he would have symptoms then and there"* (T. 206-207).[7]

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[6] The claimant testified that after the employee's loud conversation with her at the bowling alley *he collapsed within "less than ten minutes"* (T. 45-46).

[7] Claimant's medical witness, Dr. Frank Talbot, agreed with Dr. Dessoff that the employee's arterial condition was a progressive disease (Tr. 117), aggravated by his age, obesity and smoking

ROBERT J. BRADY, JR.: That the witness was the Assistant to his father who was president of the Robert J. Brady Company, Inc., the employer, and that the witness was "in charge of the entire operations of the Company"; that he was employed by the company in 1962 and knew the employee (T. 279); that the witness is familiar with the payroll records and time cards of the company; that these items were kept in the regular course of business by the company's official accountant who transposes the weekly figures from the time cards into the account book; that since the time cards are always punched by the employees themselves, "in this sense the employee would control that portion of it" (T. 279-282, 284); that the time cards show the employee took no sick leave during the months of October and November of 1962 (T. 283-284, 308-309); that for the pay period in the week the employee died, the time cards indicate he worked a regular forty-hour schedule with no overtime and no work on Saturday;[8] that the time cards reflect the same work history for the employee in the week prior to his final week, viz., a forty-hour week and no Saturday work (T. 284-285); that the company had moved its plant to Que Street where the employee began working in September 1962; that to accomplish the move "a sizeable work crew" of new employees was hired to assist with the transfer of heavy

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habit (T. 118). Dr. Talbot admitted that he "did not advise [the employee] not to return to work" for the subject employer in November 1961 (T. 120). He further testified that electrocardiograms in December 1961 and June 1962 showed a "stabilized" condition with no new damage (Tr. 124-126), and, thus, when he last saw the employee in July 1962, no hospitalization was indicated because the employee had been free of chest pains for about a month (T. 131-132). He added that "it would be only *speculation*" for him to say why the employee had the heart attack in November 1962 which had resulted in death (T. 132). Again agreeing with Dr. Dessoff, claimant's medical expert testified that from the suddenness of that death he would "suspect . . . an arythmia such as ventricular fibrillation" as the cause thereof (T. 133).

[8] These records contradict both the testimony of the claimant and her son, Milton Lee Bussius (who testified, T. 209, *et seq.*, and T. 274, *et seq.*).

machinery, cleaning up and the like;[9] that there is "absolutely no record" of the widow's son, Milton Bussius (who testified for himself and his mother, see footnote 8, *supra*), ever having worked at this Que Street plant (T. 291-292);[10] that while the company records do show that Milton Bussius was employed by the Brady Company in the summer of 1962, there is no record of his working after August 9, 1962 (i.e., after the move), nor did the witness ever see him in either plant after that date (T. 297-299); that, contrary to Bussius' testimony, the witness has no knowledge of any cash payments ever having been made to Bussius for work on Saturdays at the M Street plant (from which the company moved) after August 9, 1962 (T. 304); that when the employee returned to work after his heart attack in 1961, the work he did "was exactly the same" as that which he had done prior to the heart attack (T. 323).

(c) *Discussion*

The deputy commissioner's task in the instant case, as trier of the facts, was to decide from the evidence in the record, and the inferences to be drawn therefrom, whether the employee's death from coronary insufficiency was causally related to his employment or, instead, to causes unrelated thereto.

It was solely within the province of the deputy commissioner, in his role of trier, to determine the credibility of witnesses. He could believe any part or all of the evidence presented according to his judgment of its truthfulness and reliability. *Associated General Contractors* v. *Cardillo*, 70 App. D.C. 303, 106 F.2d 237 (1939); *Kwasizur* v. *Cardillo*, 175 F.2d 235 (3rd Cir., 1949), *cert. denied* 338 U.S. 880; *Gooding* v. *Willard*, 209 F.2d 913 (2nd Cir., 1954); *Wilson & Co.* v. *Locke*, 50 F.2d 81 (2nd Cir., 1931); *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403

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[9] The claimant had indicated in her testimony that the employee had been involved in the actual moving activities.

[10] Bussius testified to the contrary. See footnote 8, *supra*.

(2nd Cir., 1961); *Hudnell* v. *O'Hearne*, 99 F.Supp. 954 (Md. 1951).

The rule as to acceptance upon judicial review of the deputy commissioner's evaluation of the credibility of witnesses applies also to medical witnesses. *Todd Shipyards Corp.* v. *Donovan*, 300 F.2d 741 (5th Cir., 1962); *John W. McGrath Corp.* v. *Hughes, supra; Gooding* v. *Willard, supra.* With respect to any conflict in the medical testimony offered by the parties, a deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. He may rely upon his own observation and judgment in conjunction with the evidence. *Todd Shipyards Corp.* v. *Donovan, supra*, 300 F.2d 741 (5th Cir., 1962); *Hampton Roads Stevedoring Corp.* v. *O'Hearne*, 184 F.2d 76 (4th Cir., 1958); *Contractors PNAB* v. *Pillsbury*, 150 F.2d 310 (9th Cir., 1945); *Crescent Wharf & Warehouse Co.* v. *Cyr*, 200 F.2d 633 (9th Cir., 1952); *Baltimore & O.R. Co.* v. *Clark*, 56 F.2d 212 (Md. 1932); *Jarka Corporation of Philadelphia* v. *Norton*, 56 F.2d 287 (Pa. 1930); *Liberty Stevedoring Co.* v. *Cardillo*, 18 F. Supp. 729 (N.Y. 1937); *Zurich General Accident & Liability Ins. Co., Ltd.* v. *Marshall*, 42 F.2d 1010 (Wash. 1930); *Ryan Stevedoring Co.* v. *Norton*, 50 F.Supp. 221 (Pa. 1943); *Liberty Mutual Ins. Co.* v. *Marshall*, 57 F. Supp. 177 (Wash. 1944), aff'd 151 F.2d 1007 (9th Cir., 1945); *Marine Operators* v. *Barnhouse*, 61 F.Supp. 572 (Ill. 1944); cf. *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959). Further, he may accept part and reject part of the testimony of an expert witness. *Banks* v. *Chicago Grain Trimmers Ass'n, Inc., supra*, 390 U.S. 459 (1958), reh. denied 391 U.S. 929.

It is readily apparent from the evidence heretofore outlined that the deputy commissioner in the instant case had ample warrant in the record for his determination that there was no causal relationship between the work of the employee, either as an original or as an aggravating or accelerating force, and the employee's death resulting from a coronary insufficiency. The record contains undisputed medical testimony that the employee was suffering from

coronary arterial disease predating his employment with the Robert J. Brady Company and that his death was not a consequence of his work activities. Instead, this testimony showed that the disease was one with a natural progression downward which, in the employee's case, might have been aggravated by the argument he had with his wife at the bowling alley long after he had stopped work for the day. Dr. Dessoff testified unambiguously that had the employee died as a result of the causal or aggravating effects of any employment activities, death would have occurred at or near the time of the particular activity, and not late in the evening hours after all work activities had ceased. Further, the employee in connection with his earlier claim for disability compensation had himself testified that, as of the date of his testimony *(March 26, 1962), he had not had any difficulty in performing his work since his return to employment on November 1, 1961, and that he had endured no cardiac symptoms since that return.* Dr. Talbot testified at that hearing that he saw no reason why the employee should not have returned to work, and the employee in testifying admitted that Dr. Gordon was of a similar opinion. On such evidence, the deputy commissioner in the earlier claim found no causal relation between the 1961 heart attack and the employee's work, and that finding was sustained on appeal.

The compensation order now being appealed rejects the claim for death benefits for similar reasons, the present deputy commissioner having found that the employee's death "was neither caused, aggravated, nor accelerated by the employment." In essence, the basis for the present order with respect to events *after the employee's return to work in November 1961* had already been covered in part in the earlier hearings on the employee's disability claim, to which the widow had subsequently substituted herself as a party following her husband's death. The employee himself, the best source of information as to the effect which the work had on him, testified, as noted above, that he could work without difficulty. The subsequent hearing, namely, the one now on review and which seeks to traverse

part of this same period of time,[11] has produced no additional evidence which could reasonably be said to compel or require the deputy commissioner now to find that the employee's work, following his return to employment, had caused or had aggravated his pre-existing coronary condition.

Both Dr. Talbot and Dr. Dessoff, asserted in the present proceedings (as they had done in the earlier disability hearings) that the employee was suffering from progressive atherosclerosis, a disease which would worsen with age regardless of work activities. Neither doctor regarded the nature of the employee's work as particularly dangerous to a man in his condition. Both testified to the presence in the employee of several other elements which are often present as possible aggravating factors in the progress of such a disease, including obesity and smoking. Dr. Talbot, who was the claimants' own witness, was hesitant, chary, equivocal and conjectural in his willingness to assign work as an aggravating factor, refusing even to hospitalize the employee when he last saw him in July 1962. Dr. Dessoff, on the other hand, was firm in his opinion that the employee's work had had no adverse effect in the deterioration of the heart. In essence, the instant record supports the medical theory of both doctors that the employee's fatal heart attack was inevitable and would have occurred in any event. As we have seen, the employee collapsed many hours after the end of the workday while apparently involved in a domestic quarrel which had given rise to agitation on his part. The evidence had disclosed in this connection that he was a highly emotional individual and deeply in debt. In the light of Dr. Dessoff's testimony, the deputy commissioner could reasonably determine, as he did, that the time lag between work and death meant that the latter was in no way causally related to the former.

While workmen's compensation laws will be liberally

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[11] The employee, as noted, had himself testified in March 1962, subsequent to his return to work in 1961. Claimant predicates her entitlement on the effects of that return.

construed, it should be noted that, despite the presumption of Section 20(a) of the Longshoremen's Act, 33 U.S.C. 920(a), that a "claim" comes within the Act, a claimant is still required to show to the deputy commissioner's satisfaction the existence of facts supportive of a claim for compensation. There is no presumption in favor of a claimant arising merely from his filing of a claim. *Hines* v. *Pacific Mills*, 214 S.C. 125, 51 S.E. 2d 383 (1940). He must still establish facts supportive of his claim of compensability. It is still the law that the ultimate burden [12] is on him to prove the facts entitling him to an award of compensation, and this burden does not shift. In short, it is not necessary for the employer to prove a negative. *Gooding* v. *Willard*, *supra*, 209 F.2d 913 (2nd Cir., 1954); *Kwasizur* v. *Cardillo*, *supra*, 175 F.2d 235 (3rd Cir., 1949). The rejection follows the claimant's failure to establish his claim. In the *Gooding* case, it was said:

> We might let decision turn on the above, but it should also be noted that *the burden to show that the accident was a contributing cause of the death was on the appellee.* It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of causal connection, *the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged.* The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence it was at least an expression of the determination of the Commissioner that the evidence was short to show affirmatively a causal connection between the accident and the death. It is abundantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee. As no more was needed to support his decision it was error to set it aside. (Emphasis supplied.)

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[12] As distinguished from the mere proof necessary to overcome any prima facie case arising from Section 20(a), *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935).

In line with the foregoing principle, this Court has itself stated as follows with respect to the presumptions created by the Act in Section 20 (*Indemnity Ins. Co. of North America* v. *Hoage*, 61 App. D.C. 173, 58 F.2d 1074, 1075 (1932), reversed on other grounds, 288 U.S. 162):

> This statutory presumption, however, furnishes merely a basis for proof and not a substitute therefor. It does not shift the burden of proof from the *claimant* to prove by substantial evidence that the injury arose out of and in the course of his employment. . . . (Emphasis supplied.)

And the Fifth Circuit, speaking only recently on this subject, has significantly observed (*Young & Co.* v. *Shea*, 397 F.2d 185, 188 (1968)):

> . . . Under 33 U.S.C. § 903(a) [which specifies the bases for Longshoremen's Act liability] the *claimant* has the burden of proving all that is not presumed under Section 920 [Section 20 of the Act]. See Eschbach v. Contractors, Pacific Naval Air Bases, 7th Cir. 1950, 181 F.2d 860. *Section 920 does not presume an injury so the claimant must prove its existence.* Sykes v. O'Hearne, D. Maryland, 1960, 181 F. Supp. 368, 371. (Emphasis supplied.)

For this reason, judicial review of a rejection of a claim, as here, involves a somewhat different viewing of the evidence from review of an award of compensation. In the latter case, there must be affirmative evidence in the record to support the award; in the former, affirmative evidence is not needed to support the denial of compensation since, upon failure of a claimant to carry his burden of proof in support of his claim, the claim must be rejected notwithstanding the absence of affirmative evidence to disprove the claim. The rejection follows the claimant's failure to establish his claim by maintaining the ultimate burden that is his. *Gooding* v. *Willard, supra; Kwasizur* v. *Cardillo, supra.*

The judicial function is not for the Court to decide the case for itself, as we have seen, but, rather, to determine

whether there is substantial evidence in the record that will support the decision reached by the deputy commissioner. In the instant case, there was sufficient legal basis, predicated upon the evidence in the record, both lay and medical, together with the inferences reasonably to be drawn therefrom, to support the deputy commissioner's conclusion that the employee's death was not causally related to his employment activities. Certainly, it cannot be said that on the record as a whole the deputy commissioner was "compelled" to reach a conclusion contrary to the one he made, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), that his conclusion was "forbidden by the law", *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), or that his holding was "irrational", *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359 (1965).

CONCLUSION

In view of the above, it is the respectful submission of the appellee Deputy Commissioner that the compensation order complained of is in accordance with law, and that the judgment of the Court below sustaining it was proper and should be affirmed.

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